No. 80-581

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Supreme Court of the United

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,
Appellants,

vs.

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, AND DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,
Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF AMICI CURIAE OF THE STATES OF NEW JERSEY AND MICHIGAN IN SUPPORT OF APPELLANTS

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Interest of the Amici

New Jersey is an energy consuming state. In the past, its electric utilities have derived a substantial portion of

their power from oil. However, most recently, New Jersey has been forced by rising costs and Federal energy policy to look to coal as the generation source of electric power. A combination of economics and Federal energy policy are expected to continue to induce a substantial rise in the use of coal by New Jersey and other Northeastern States.

New Jersey utilities have historically not used coal from Montana and the Rocky Mountain area since rail transportation has always added a prohibitive cost factor to its use in the Northeast. New Jersey coal sources are West Virginia, Virginia and Pennsylvania, with a smaller amount coming from Kentucky and Georgia. In 1979, New Jersey utilities purchased over two millions tons of coal.* New Jersey has also been increasing its consumption of power generated by coal. The most recent figures indicate that New Jersey electric utilities burned 300,000 more tons of coal in the period of January through August 1980 than they did through the same period of 1979. New Jersey expects that the coal consumption will steadily increase throughout the contemplated future.

Presently those states which supply the coal needs of New Jersey and the bulk of the Northeast have relatively low severance taxes on the production of this energy source. However, New Jersey fears that if this excessive Montana tax is allowed to stand, the Eastern coal-producing states will, in turn, raise their severance taxes to collect a similar amount from what is admittedly a vast source of revenue. This will result in unfettered interests of the energy producing states being pitted against those of the energy consuming states.

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* This figure excludes and electric power (generated by coal) which was purchased by New Jersey utilities from utilities located in other states.

As a consumer state, New Jersey has an interest in seeing that an energy-rich state is not permitted to override national objectives for its own financial gain. Any constitutional rule which permits such assault by one state or group of states upon others frustrates national energy policy as well as striking at the heart of the policies underlying the Commerce Clause.

Nearly 1.5 billion dollars is the estimated direct cost to the State of Michigan over the next two decades from the Montana Coal Severance Tax. Presently levied on an annual shipment into Michigan of some 3.5 million tons of coal, the burden of the tax will continue to mount with an expected growth to 8 million tons imported. The injury to Michigan's economy from this massive transfer of revenues cannot be overstated.

Michigan has a vital interest, thus, in securing a strict scrutiny of this fetter on interstate commerce.

Summary of Argument

The Montana Supreme Court, in its opinion upholding the Montana Coal Severance Tax, relied strongly upon a line of cases decided by this Court over fifty years ago. These cases applied a "mechanical test" to determine whether the activity taxed by a state was "in" interstate commerce and therefore subject to scrutiny under the standards of the Commerce Clause. This "mechanical test" has been eroded by more recent decisions of this Court which have consistently held that activities which "substantially affect" interstate commerce must meet Commerce Clause standards. The Montana Coal Severance Tax is designed so that it substantially affects interstate commerce and therefore should be tested against the strictures defined in *Complete Auto Transit Inc.* v. *Brady,* 430 U.S. 274 (1977). Specifically, the Montana Supreme Court ruled

that the "fair relation" of state services to the amount of tax imposed was a matter of law, which did not require an evidentiary hearing to determine the true value of services provided by the state. Such a ruling in essence vitiates one point of the "four-pronged test" most recently affirmed by this Court in *Exxon Corp.* v. *Wisc. Dep't of Rev.*, 100 S. Ct. 2109, 2122 (1980) and is an erroneous interpretation of the law.*

ARGUMENT

A State tax on an activity which "substantially affects" interstate commerce should be subject to scrutiny under a Commerce Clause test.

The Montana Supreme Court stated that since the taxed activity was not yet "in" interstate commerce, that it need not examine the tax to determine whether it was a burden on interstate commerce. In this result, it relied principally upon a line of cases over fifty years old. *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *Oliver Iron Co.* v. *Lord*, 262 U.S. 172 (1923). The Court determined a state severance tax falls upon an activity which "precedes entry into interstate commerce." (Opinion 15, Appellants' Appendix 18a). This rationale was based upon the "mechanical test" expressed in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), which distinguished from the actual severance or production of a commodity and the sale and shipment of that commodity in interstate commerce. *Id.* at 303-03.

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* This *amici curiae* brief deals solely with arguments raised under the Commerce Clause. *Amici* rely upon arguments raised by appellants on those issues under the Supremacy Clause.

Since that time, this Court has eroded the "mechanical test" to make clear that acts which "substantially affect" interstate commerce, whether "in" or "out" of commerce, raise questions under the Commerce Clause. *See, e.g., Arizona Public Service Co.* v. *Snead,* 441 U.S. 141, 150 (1979); *Hunt* v. *Washington Apple Advertising Comm'n,* 432 U.S. 333, 350 (1977). A state's tax or regulation cannot be "immune" from Commerce Clause scrutiny by a state's tax claim that it applies to a purely local activity, *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 140 (1970). The distinctions employed by the court below are artificial and do not "establish a consistent and rational method of inquiry" which examines the "practical effect of a challeged tax." *See, Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.,* 100 S. Ct. 1223, 1224 (1980).

In addition to rejecting, out of hand, the claim that the Commerce Clause applies to a state severance tax, the court below also reached an erroneous conclusion regarding the standards imposed by the Commerce Clause as announced by this Court. This standard, as most recently articulated, requires that the court examine:

> "the 'practical effect' of the tax to determine whether it is 'applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.'"

Exxon Corp. v. *Wisc. Dep't of Rev.,* 100 S. Ct. 2109, 2122 (1980), quoting *Complete Auto Transit, Inc.* v. *Brady, supra,* 430 U.S. at 279. This four-pronged test to determine the constitutional validity of state taxes on activities which affect interstate commerce clearly sets forth four individual points of scrutiny, each of which must be met for the tax to pass constitutional muster.

However, the court below has held that the "fairly related" point may be determined as a matter of law, thus obviating the necessity for a factual hearing. In addition the court held that this point was satisfied as a matter of law, since Montana provides general governmental services to its citizens (including appellants). Such a holding fails to give the tax the "careful scrutiny" explicitly demanded by *Complete Auto Transit* to determine whether it is, in fact, fairly related to specific benefits and services alleged to be provided by the state. It thus glosses over one of the more repugnant aspects of the tax: that it was deliberately tailored to "export" the effects of the tax to the ultimate consumers of the energy source, all non-residents of the State of Montana. If the "fair relation" point of the four-pronged test is to have meaning, this requirement cannot be met by a simple declaration that general governmental services are always "fairly related" to a tax imposed.

No case has come to this Court where the "fair relation" point has been squarely raised in the context of a factual dispute. However, other decisions clearly indicate that this point is not to be disposed of in such a facile manner. *See, e.g., Washington Rev. Dep't* v. *Stevedoring Ass'n,* 435 U.S. 734, 750-51 (1978). As well, this Court has, in other contexts, determined what constitutes a "fair share" relationship between levies imposed and services provided. In that determination, the amount of the tax, not its formula, has been this Court's central concern. The amount must show a reasonable correlation to the privilege of use of the state's facilities, as well as reflect a uniform, fair and practical standard relating to public expenditures. Thus, a state highway toll on interstate carriers was examined and found to meet these requirements. *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542, 545-47 (1950). As well, a state "head tax" on inter-

state airplane passengers was analyzed and held, on the basis of the record, not to be discriminatory, to be reasonably related to the services provided, and not excessive in light of the costs incurred by the taxing authorities. *Evansville Airport* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-20 (1972).

States have broad discretion in fashioning apportionment formulas to determine what income may be taxed. *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt., supra.* However, if that state formula yields a grossly distorted result which cannot be explained by a factual analysis, it must fail. *Norfolk & W.R. Co.* v. *Tax Comm'n,* 390 U.S. 317, 326-27 (1968). As pointed out by appellants, Montana's tax revenues generated by this tax are in gross disproportion to the legitimate needs of the State. In fact, 50% of the revenues are not presently spent but are placed in a trust fund for future use. This excessive coal tax seriously affects those consuming states which depend on western coal. It may also be a dire portent of future divisions between energy-rich and energy-poor states. Therefore such taxes should be declared in violation of the Commerce Clause in appropriate circumstances.

CONCLUSION

For each of the reasons stated in the principal brief on the merits and the amici curiae brief, the judgment of the Montana Supreme Court should be reversed and the matter remanded for further proceedings.

Respectfully submitted,

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